

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(JUDGES GRIBBS, KELLY, AND SAWYER)

NOV 2002
TERM

MARCIA SNIECINSKI,

Plaintiff-Appellee,

v.

BLUE CROSS AND BLUE SHIELD
OF MICHIGAN.

Defendant-Appellant.

Supreme Court No. 119407

Court of Appeals No. 212788 C

Wayne Circuit No. 96-616254-CZ
(Hon. Marianne O. Battani)

PLAINTIFF-APPELLEE'S REPLY TO
DEFENDANT/APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

HURLBURT, TSIROS, ALLWEIL
& PEREZ, P.C.

BY: MANDEL I. ALLWEIL (P34115)
Attorney for Plaintiff-Appellee
821 S. Michigan Ave.
P.O. Box 3237
Saginaw, MI 48605-3237
(989) 790-3222



TABLE OF CONTENTS

INDEX OF AUTHORITIES	iii
OVERVIEW.....	1
ARGUMENT I	
REPLY TO DEFENDANT’S REPLY REGARDING THE PLAINTIFF’S RECITATION OF THE FACTS.....	1
A. Defendant asserts in Sub-A of its Reply Brief that Plaintiff Erroneously Portrayed BCNEM Board Members as Employees of BCBSM. The Defendant’s Assertion is Incorrect as it is Unequivocally true that BCNEM Board Members were Employees of BCBSM.....	1
B. Contrary to the Defendant’s Wishes that the Merger of the Marketing Departments of BCNEM and BCBSM were more than Formalities, The Defendant’s own Documents and Witnesses Testified that the Employees were to be Transferred and the Transferring was a Mere Formality.....	2
C. Defendant Asserts that the Plaintiff Failed to Provide the Court with an Honest and Accurate Summary of how LTD worked when, in fact, it is the Defendant that Consistently Misstates the Record and Selectively Overlooks Evidence and References Clearly Put Forth by the Plaintiff.....	3
D. Defendant’s Allegation that the Plaintiff “Significantly Misrepresented the Trial Testimony of Pat Stone is Untrue. Stone was a Witness who Repeatedly had Selective Memory Lapses and was Regularly Shown to be Deceptive.....	5
E. Defendant Erroneously Accused the Plaintiff of Misrepresenting the Record regarding Donald Whitford. Plaintiff Presented Substantial Evidence that Donald Whitford, as Influenced by Michael Curdy, had Discriminatory Animus and Whether the Defendant Agrees with it is Irrelevant for Purposes of Appeal.....	7
ARGUMENT II	
THERE WAS OVERWHELMING EVIDENCE SUPPORTING THE JURY’S DECISION.....	8
A. There was Overwhelming Evidence Supporting the Jury’s Decision.....	8
B. Defendant Waived any Affirmative Defense of Failure to Mitigate Damages by Failing to Raise the Defense in its First Responsive Pleading and Defendant’s Claim that it Properly Preserved its Defense Because it did not have Enough Information to Plead the Defense in its First Responsive Pleadings is a Blatant Cover-up and is Not True.....	9

1.	Defendant’s Claim that it did not Possess any Information at the time of its Original Answer is not True.....	9
2.	Defendant wants this Court to Legislate Exceptions to the Clear and Unequivocal Intent of the Michigan Court Rules that an Affirmative Defense must be Raised in the First Responsive Pleading.....	12
C.	The Defendant’s Continued Misrepresentation that the Plaintiff did not Look for any Work is not Supported by the Evidence of Record. Moreover, in light of the Plaintiff’s Testimony that she Looked for work for over two years before Resigning an Inferior Position at BCNEM when she decided to Return to School, mandated that the Defendant Prove by a Preponderance of the Evidence that the Plaintiff could have Obtained Comparable Employment with Reasonable Effort if the Defendant Wanted to Prove that the Plaintiff did not Legally Mitigate her Damages.....	13
RELIEF REQUESTED.....		19

INDEX OF AUTHORITIES

MICHIGAN CASES:

<i>Cunningham v. 4-D Tool Co.</i> , 182 Mich App 99 (1990).....	5
<i>Helder v. Sruba</i> , 462 Mich, 92, 99, 611 NW 2d 309 (2000).....	13
<i>Horn v. Department of Corrections</i> , 216 Mich App 58, 548 NW2d 660 (1996).....	10
<i>Lesner v. Liquid Disposal Services, Inc.</i> , 466 Mich 95, 102; 643 NW 2d 553 (2002).....	13
<i>Logan v. Craig</i> , 20 Mich App 497, 174 NW2d 744 (1988).....	14
<i>Macomb County Road Commission v. Fisher</i> , 170 Mich App 698, 428 NW2d 744 (1988).....	14
<i>Omme Financial, Inc. v. Shacks, Inc.</i> , 460 Mich 305, 311, 596 NW 2d 591 (1999).....	13
<i>Robinson v. City of Detroit</i> , 462 Mich 439, 613 NW2d 307 (2002).....	13
<i>Tyler v. Livonia Public Schools</i> , 459 Mich 382, 392-393, n. 10, 590 NW 2d 560 (1999).....	13
<i>University of Michigan Board of Regents v. Auditor General</i> , 167 Mich 444, 450, 132 NW 11037 (1911).....	13

STATUTES

MCLA 37.2101, Elliott Larsen Civil Rights Act.....	19
MCR 2.111(F)(2) and (3).....	10
MCR 2.114(D)(2).....	10
MCR 2.118.....	12

OVERVIEW:

Defendant-Appellant's Reply brief mirrors the Defendant's conduct throughout the appellate process. Unable to accept that the jury is the factfinder in the case, the Defendant has consistently restated each argument that the jury dismissed. The Defendant resorts to pointing to specific parts of the transcript in avoidance of the whole trial. Defendant apparently forgets that this is an appeal, not a retrial. Defendant forgets that the evidence is to be viewed most favorably to the Plaintiff.

I. REPLY TO DEFENDANT'S REPLY REGARDING THE PLAINTIFF'S RECITATION OF THE FACTS.

A. Defendant asserts in Sub-A of its Reply Brief that Plaintiff Erroneously Portrayed BCNEM Board Members as Employees of BCBSM. The Defendant's Assertion is Incorrect as it is Unequivocally true that BCNEM Board Members were Employees of BCBSM.

Defendant in faulting the Plaintiff's claim regarding BCNEM Board Members being employees of BCBSM claimed that the Plaintiff's citation did not support the assertion. [See Def. Reply p. 1]. To the contrary, Plaintiff correctly directed to the Court to the Appendix at 411-412a. That is, as the Defendant should have known, a reference to the Defendant's Appendix. If the Defendant would have reviewed 411-412a of its own Appendix the Defendant would have seen that Patricia Stone, the head of HR for BCNEM, identifies her direct report, Joel Gibson, as an employee of BCBSM. [411a]. She also identified Arnie Duford, the CEO of BCNEM, as an employee of BCBSM [412a]. Indeed, the actual quoted material is set forth on pages 5-6 of the Plaintiff's Brief on appeal].

B. Contrary to the Defendant's Wishes that the Merger of the Marketing Departments of BCNEM and BCBSM were more than Formalities, The Defendant's Own Documents and Witnesses Testified that the Employees were to be Merely Transferred and the Transferring was a Mere Formality.

Defendant in the first paragraph of its Reply brief on this issue totally distorts and, indeed, apparently does not understand the Plaintiff's claim. Plaintiff, contrary to the Defendant's claim, does not dispute that each employee who was transferred from BCNEM to BCBSM was "technically" a new hire. That is why this case was sent to the jury on a theory of failure to hire.¹

Plaintiff spent extensive time explaining the perfunctory process that was involved in merging the departments from BCNEM and BCBSM and the placement of the transferred employees who, were technically new employees or new hires for BCBSM. Defendant does not address the Plaintiff's arguments. Rather, the Defendant regurgitates the same arguments that were heard and rejected by the jury, Judge Battani, the Court of Appeals and now should be rejected by this Court.

Trial Exhibit 32, a document authored by Defendant, demonstrated that the transfer from BCNEM to BCBSM was a mere formality. The document shows that all of the BCNEM employees were to be transferred, barring a strike, on a date certain. It states that Nancy Abramson will get with them to fill out the paperwork to "get them transferred". [455b].

Donald Roseberry testified that every single person within the marketing department of BCNEM was going to be transferred to BCBSM **regardless of the quality of their work.**

¹ The reality is that this is equally a wrongful discharge case as BCBSM controlled everything. However, recognizing that technically Plaintiff was never processed by BCBSM, because of her pregnancy and pregnancy complications, the case went forward as a failure to hire. The jury instruction was worded as a failure to hire as was the jury verdict form. It is merely two sides to the same coin.

[140b]. As Mr. Roseberry admitted it was a “foregone conclusion” that the forces were being merged and all BCNEM employees would be transferred to BCBSM. [T. 140-141b].

Trial Exhibit 9 demonstrated that it was not an issue of whether an employee would be placed with BCBSM but, rather, the issue was where the person would be placed. [421b]. It was confirmed by every person who testified that no person was to lose a job. That each BCNEM marketing employee was to be placed at BCBCS. [See, 195-196b, 222b, 225b]. The application process was a mere formality. The only issue was where that employee would be placed.

C. Defendant Asserts that the Plaintiff Failed to Provide the Court with an Honest and Accurate Summary of how LTD worked when, in fact, it is the Defendant that Consistently Misstates the Record and Selectively Overlooks Evidence and References Clearly Put Forth by the Plaintiff.

Defendant asserts, in a footnote, that the Plaintiff’s allegation that the decision to keep Plaintiff on BCBSM’s books was made exclusively by BCBSM is not supported anywhere in the Plaintiff’s brief. [Defendant Reply Brief p. 3 fn 2]. Defendant cites Plaintiff’s Brief page 15. If one reads page 15 one would see that the allegation was supported by a reference to Vol IA 44-45. [Plaintiff’s Brief p. 15]. Plaintiff acknowledges an error in citing to the trial transcript rather than the appendix. However, if one looks to the trial transcript IA 44-45 that translates to 153-154a of the Defendant’s Appendix. When one looks to that part of the testimony this Court will see what the jury heard. Pat Stone told the Plaintiff the following:

“[PAT STONE] told me that **Blue Cross** had made the decision that they didn’t want to absorb the medical disability at the time. Therefore, they wanted me to take disability benefits through BCN and then once I was –**six weeks after I had my child and returned to work I would be transferred over to BCBS at that time**”

[154a] [emphasis added].

Therefore, the unequivocal and only testimony on the issue is that BCBSM unilaterally made sure that the Plaintiff stayed on the books of BCNEM.

The Defendant has the audacity to claim that the Plaintiff “misleads” the Court in claiming that she was the only individual who lost their job at BCBSM as a result of the merger. The evidence is unrefutable and unmistakable. No one was to lose his or her position as a result of the merger, That testimony has now been gone over repeatedly. Suffice it to say that the testimony was confirmed by virtually all of the Defendant’s agents including but not limited to Roseberry, Whitford, Curdy, and Ms. Elston.

The record is clear that the only BCNEM employee who lost their position as a result of the merger was the Plaintiff. The Defendant did not, and could not name another individual in the marketing department who did not transfer over.

The facts on the LTD plan are equally clear. The evidence showed that 89 out of 89 of BCBSM employees who went off on LTD were all placed back in their position at the conclusion of their leaves. [See T. 507-510b]. Defendant alleges that the Plaintiff misrepresents that the policies are essentially identical between BCBSM and BCNEM. [Reply brief p. 3]. The allegation is, again, incorrect and not supported by the evidence of record.

First, Ms. Stone, as was her repeated practice, either misstated or purposefully did not tell the truth. First she tried to say that the respective policies were different. Then she admitted that the carrier for the two was the same. Then she admitted that there was not a lot different in the policies and that she could not identify a difference. Then she admitted that each step of the return policy was the same comparing Exhibit 56 with Exhibits 14 & 15. Most critically, however, if the Defendant is now trying to claim the policies are different they failed to

demonstrate a single difference at the time of trial. [See Stone testimony @ 297b-300b also compare LTD policies and exhibits 14, 15, 56; 433-434b; 436-439b, 594b].²

The LTD Plans were essentially the same. BCBSM made the decision to keep the Plaintiff on the LTD of BCNEM. BCBSM made the decision not to transfer the Plaintiff over, and thereby not hire her, because of her pregnancy and pregnancy complications.

D, Defendant's Allegation that the Plaintiff "Significantly Misrepresents the Trial Testimony" of Pat Stone is Untrue. Stone was a Witness who Repeatedly had Selective Memory Lapses and was Regularly Shown to be Deceptive.

Defendant initially asserts that the Plaintiff misrepresented that Stone only gave Plaintiff isolated sheets of her Franklin Planner. Again, it is the Defendant who is misstating the record. The record shows as follows:

"Q. When I requested your Franklin Planner you went through it and provided the pages.
"A. Yes.
"Q. I did not see the whole Franklin Planner. Is that true?
"A. No. You asked for a specific thing, and I gave the attorney that.
[265b].

The reality, of course is, that the Plaintiff asked for the Franklin Planner Notes and Stone went through and gave what she thought was relevant. All of the pages received from the Franklin Planner were hand selected pages of interest provided by Stone.

Defendant also asserts in its Reply Brief that the entries were always contemporaneous. [Defendant Reply Brief p. 6 citing 268b]. Like so many other issues, Ms. Stone provided

² Defendant cites *Cunningham v 4-D Tool Co* 182 Mich App 99 (1990) and makes a reference that in 85 pages of briefing that the Plaintiff does not deal with this case. The reason that the case is not dealt with is that this case is, in part, a failure to hire case. Therefore, the fact that the Plaintiff did not necessarily become an employee of BCBSM is irrelevant. The relevant issue is that BCBSM purposefully and intentionally kept the

numerous different answers depending on who was asking the question. Ms. Stone admitted that she could make contemporaneous entries and sometimes she might not. [267b]. She admitted that she did not recall whether any specific notation was made contemporaneously with the entry. [268b]. The evidence of record also demonstrated that Ms. Stone was rather selective in documenting certain items, such as complaints regarding Mr. Curdy. [272b].

Defendant again charges that Plaintiff has misstated the record in that Ms. Stone had no recollection of Curdy's offensive pregnancy comments. [Defendant's Reply Brief p.6]. Defendant states that the Plaintiff's cite does not support the claim. While the Plaintiff admits that one citation was incorrect, one quote in Plaintiff's Brief immediately followed with the correct citation. The Defendant ignored it. [See Plaintiff's Brief pp. 18-19 citing the record @ 269-271B]. The evidence, again, speaks for itself.

"Q. You also said on direct examination that Mr. Curdy – you were not aware of any complaints regarding any statements regarding pregnancy were made by Mr. Curdy to Sniecinski. Do you remember that testimony?

"A. In my deposition.

"Q. No. What you just said to Mr. Fienbaum.

"A. I thought it was relative to attendance

"Q. Okay. You didn't remember any pregnancy comments?

"A. I thought the question was complaints.

"Q. About pregnancy statements.

"A. Yeah.

"Q. And you don't remember any?

"A. I don't remember a complaint about pregnancy, No.

"Q. Do you remember being informed by Ms. Sniecinski that Mr. Curdy had made some offensive pregnancy comments?

"A. I don't have them noted.

"Q. But do you remember being informed?

"A. Right now I'm not having any recall. I'm sorry [268b-2269b].

Plaintiff from becoming an employee because of her pregnancy and prior pregnancy complications. The jury found in the Plaintiff's favor as a result of the failure to hire.

Again, the transcript is exactly as the Plaintiff alleges and contrary to what the Defendant urges. Ms. Stone, of course, was then impeached with her deposition testimony where it was clear that her lapse of memory was at least temporarily beneficial to BCBSM. In the ensuing pages Ms. Stone was repeatedly impeached. [For example please see pgs 269b-275b].

E. Defendant Erroneously Accused the Plaintiff of Misrepresenting the Record regarding Donald Whitford. Plaintiff Presented Substantial Evidence that Donald Whitford, as Influenced by Michael Curdy, had Discriminatory Animus and Whether the Defendant Agrees with it is Irrelevant for Purposes of Appeal.

Defendant repeats its same claims regarding Whitford that have been rejected by every audience who has heard it. The only issue on appeal is when the evidence is viewed in the light most favorable to the Plaintiff was there evidence to support the verdict of the Jury. A sophisticated jury found the evidence overwhelming and ruled in the Plaintiff's favor by a 7-0 verdict. Judge Battani, now a federal district judge, also agreed. A panel of the Michigan Court of Appeals, also in a unanimous decision likewise ruled that the Plaintiff proved her case.

Defendant argues that the Plaintiff had no personal knowledge of how much time Curdy actually spent with Whitford. [Defendant's Reply Brief p. 6]. Plaintiff, of course would not have had personal knowledge of how much time these gentlemen spent together. Plaintiff did not prove the claim, however, through her testimony. Plaintiff proved the claim through the testimony of Curdy and Whitford, two men who would have knowledge of the time that they spent together. Plaintiff did prove, in this manner, that Curdy spoke to Whitford on almost a daily basis. [189-190b]. Curdy did not disagree that he was the ears, eyes, and nose for Whitford regarding BCNEM employees. [Id]. Regarding animus toward the Plaintiff, Defendant apparently forgot about the references to sabotage, threats, and the like. Moreover,

an issue that the Defendant never addresses, the entire time that Curdy and Whitford are attempting to “sabotage” the Plaintiff’s file, and insert discipline and threats for conduct that was almost a year old, neither one of these men were directly responsible for her at that time. Why then, the interest?

Plaintiff did not misrepresent anything. This was one of the most blatant cases of discriminatory animus that counsel for the Plaintiff has ever seen. Defendant can re-explain and attempt to sanitize everything with a new pure spin. However, the jury heard and observed Whitford, Curdy, Stone, and Roseberry. There is overwhelming evidence to support the jury’s verdict.

II.

ARGUMENT

A. There was Overwhelming Evidence Supporting the Jury’s Decision .

Plaintiff in its brief spent ten (10) pages reviewing the evidence that supports the jury’s verdict. [See Plaintiff’s Brief on Appeal pp 39-49]. A very educated jury decided unanimously that the Plaintiff had submitted sufficient evidence to prove by a preponderance of the evidence that the Plaintiff’s pregnancy was a reason that she was not transferred/hired by the Defendant BCBSM. This was confirmed by Judge Battani and, most recently, by a unanimous Court of Appeals.

The Defendant never explains how, under the circumstances and in light of the wealth of evidence produced, that it can be said that there was “a clear abuse of discretion” in denying the Defendant’s Motion for Judgment Notwithstanding the Verdict.

The evidence on this matter is thoroughly gone over in the Plaintiff's initial brief.

Plaintiff refers the Court to pages 39-49 of the previously submitted brief.

B. DEFENDANT WAIVED ANY AFFIRMATIVE DEFENSE OF FAILURE TO MITIGATE DAMAGES BY FAILING TO RAISE THE DEFENSE IN ITS FIRST RESPONSIVE PLEADING AND DEFENDANT'S CLAIM THAT IT PROPERLY PRESERVED ITS DEFENSE BECAUSE IT DID NOT HAVE ENOUGH INFORMATION TO PLEAD THE DEFENSE IN ITS FIRST RESPONSIVE PLEADING IS A BLATANT COVER-UP AND IS NOT TRUE³

1. Defendant's Claim that it Did not Possess any Information at the time of its Original Answer is not True.

Plaintiff's Complaint was filed in this matter on March 19, 1996. [1-6a]. In the Complaint the Plaintiff alleged that as a proximate result of the Defendant's actions that the Plaintiff suffered damages including but not limited to lost wages, loss of future wages, fringe benefits, business opportunities". [See ¶ 31 of the Complaint 6a]. This clearly put the Defendant on notice that the Plaintiff was alleging a wage/benefit loss.

Defendant's Answer was filed on or about July 11, 1996. [7-11a]. At this point the Defendant was clearly aware that the Plaintiff had claimed that she had lost wages and benefits. Defendant should have also been aware that the Plaintiff had filed, and was denied MESC benefits. They were equally well informed that the Plaintiff would have been earning almost \$50,000.00 a year had they not unlawfully discriminated against her and hired her. Defendant was well aware of what the Plaintiff previously earned. Therefore, the Defendant knew that there was a wage loss alleged. If the Defendant believed that it might be able to prove that the Plaintiff, with reasonable effort could have eliminated some of those losses, then the Defendant was obligated to plead that defense in the first responsive pleading or Defendant

³ It is also interesting to note that the Defendant had no difficulty alleging a statute of limitations defense where there was no such basis whatsoever.

waived it. [MCR 2.111(F)(2)]. Defendant did not properly plead the defense. Therefore, the defense was waived.⁴

Defendant alleges that it reserved the right to supplement its affirmative defenses as revealed during the course of discovery. [Reply brief p. 11]. However, the Defendant did not even timely do that. That is, the Defendant failed to amend its Answer and assert Affirmative Defenses that were not raised in the first responsive pleading. [See MCR 2.111(f)(3)(a)].

Defendant further argues that MCR 2.114(D)(2) prohibits the filing of a document unless it is well grounded in fact. [Reply Brief p. 11]. Apparently this rule did not prohibit the Defendant from raising the affirmative defenses of the Statute of Limitations, and that they were not the real party in interest. Two defenses that had absolutely no basis in fact and were never subsequently raised. [11a].

Evidence further established that the Defendant knew contemporaneously with the actual event that the Plaintiff voluntarily left her inferior position at BCNEM in August 1996. Plaintiff responded on 10/10/96 to a request for admission that the Plaintiff voluntarily resigned her [inferior] position at BCNEM. [18a]. Therefore, the Defendant obviously knew. The Plaintiff's deposition was taken on December 20, 1996. [59a]. Nevertheless, the Defendant did not file a Motion to Amend its Affirmative Defenses.

⁴ The Defendant's citation to the case of *Horn v Department of Corrections*, 216 Mich App 58, 548 NW2d 660 (1996) is not the least bit applicable. *Horn* involved an after acquired evidence case. Specifically, the after acquired evidence demonstrated that the Plaintiff was romantically involved with an inmate. A separate basis to terminate. In this case the Defendant was put on notice immediately that the Plaintiff was seeking lost wages, benefits. The Defendant was also aware that the Plaintiff had not replaced those lost earnings and benefits. Therefore, the Defendant, if it wanted to argue it, was required to raise the affirmative defense of failure to mitigate in its first responsive pleading.

Rather, the Defendant sits ambivalently for one-year. It is only after the Plaintiff files an Amended Complaint, which it voluntarily abandoned shortly thereafter and reverted to its initial Complaint, that Defendant attempts to slip the defense of failure to mitigate damages in the backdoor. [39a]. The Defendant failed to file a Motion to Amend their affirmative defenses. The Defendant failed to ever explain to any Court why, if the Plaintiff's initial Complaint alleged a wage and benefit loss, that the Defendant was not apprised of its affirmative defense. Defendant never explains why when Plaintiff admitted in requests to admit that she voluntarily resigned, albeit an inferior position, that the Defendant did not know of its defense. It is only on December 19, 1997, just months before trial, and almost one and one-half (1 1/2) years after their first responsive pleading does the Defendant raise the affirmative defense of failure to mitigate damages.

In Motions in Limine, heard immediately before trial, Defendant acknowledged that it was attempting to prove that there should be no damages for the period between May 26, 1994 and December 17, 1994. However, the Defendant admitted on the record that this issue was a jury question. [58a]. Mr. Feinbaum stated:

“Plaintiff was unemployed from May 26, 1994 until she was rehired by BCNEM on December 17, 1994. **We are not asking the Court to cut off damages during that period. We will concede that is a jury question.** [58a]. [emphasis added].

Mr. Feinbaum goes on to state to the Court that he is not asking that back pay be cut off during that period because it is a jury question. [Id]. That, of course, is the same jury question that Mr. Feinbaum would have been aware of when the Plaintiff asked for loss of wages, and fringe benefits in her Complaint. [6a]. It is what was known at the Plaintiff's deposition in December 1996 and before in requests to admit that were answered. Defendant had known from the outset of what the interaction between BCNEM and BCBSM as BCBSM controlled

both entities. BCBSM and Mr. Feinbaum knew that the Plaintiff suffered losses contemporaneously when they occurred. Before any discovery had occurred the Defendant was asking the Plaintiff to admit that “On December 15, 1994, Marcia Sniecinski was rehired at Blue Care Network –East Michigan. [17a ¶18]. Therefore, the Defendant was clearly aware that there was a mitigation issue and the Defendant failed to plead the defense as mandated by the Michigan Court Rules.

This very admission proves that the Defendant was attempting to prove that there was a mitigation issue for the earlier time period and if the Defendant wanted to raise that issue it was incumbent on the Defendant to raise the defense in their first responsive pleading. Again, they did not and the defense should, under any reasonable interpretation of the Michigan Court Rules and the case law for the last fifty (50) years bar the defense.

2. Defendant Wants This Court to Legislate Exceptions to the Clear and Unequivocal Intent of the Michigan Court Rules that an Affirmative Defense Must be Raised in the First Responsive Pleading or it is Waived.

As previously stated MCR 2.111 (F)(3) relates to affirmative defenses. It states that:

"(3) *Affirmative Defenses*: Affirmative defenses **must** be stated in a party's responsive pleading, either as originally filed or as amended in accordance with MCR 2.118. Under a separate and distinct heading a party must state the facts constituting:

Pursuant to MCR 2.111(F)(2) a defense that is not raised is thereafter waived. The Rule explains:

"(2) *Defenses **Must be Plead**; Exceptions*. A party against whom a cause of action has been asserted by complaint, cross claim, counterclaim or third party claim **must** assert in a responsive pleading the defenses the party has against the claim. A defense not asserted in the responsive pleading **is waived**, except for the

defenses of lack of jurisdiction over the subject matter of the action and failure to state a claim on which relief can be granted...."
See MCR 2.111(F)(2). (Emphasis added).

As this Court has stated on numerous occasions, the drafters of legislation are presumed to understand the meaning of the language it enacts into law. Statutory analysis must begin with the wording of the statute itself. *Robinson v. City of Detroit*, 462 Mich 439, 613 NW2d 307 (2002). This Court has explained that each word is used for a purpose, and as far as possible effect must be given to every word, clause and sentence. *Id* citing *Univ of Mich Bd of Regents v Auditor General*, 167 Mich 444, 450, 132 NW 11037 (1911). Where the language is clear the “Court must follow it”. *Robinson v. City of Detroit*, 462 Mich 439, @ 459.

As this Court has very recently stated:

As we have indicated with great frequency, our duty is to apply the language of the statute as enacted, without addition, subtraction, or modification. See, e.g., *Helder v. Sruba*, 462 Mich. 92, 99, 611 N.W.2d 309 (2000); *Robinson v. Detroit*, 462 Mich. 439, 459, 613 N.W.2d 307 (2000). We may not read anything into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc. v. Shacks, Inc.*, 460 Mich. 305, 311, 596 N.W.2d 591 (1999). In other words, the role of the judiciary is not to engage in legislation. *Tyler v. Livonia Public Schools*, 459 Mich. 382, 392-393, n. 10, 590 N.W.2d 560 (1999).

Lesner v Liquid Disposal Services Inc., 466 Mich 95, 102; 643 NW2d 553 (2002)

The Michigan Court Rules in this regard used the word “must” in regard to the raising and pleading of affirmative defenses. The court rules go on to specifically state that the failure to raise them constitutes a waiver.

It is a doctrine of longstanding that the term “shall” or “must” are terms that designate mandatory provisions while terms such as “may” denote discretion. *Macomb County Road Commission v Fisher*, 170 Mich App 698, 428 NW2d 744 (1988). In construing a statute a

term “shall” will be deemed “must”. *Logan v Craig* 20 Mich App 497, 174 NW2d 166 (1969).

In the instant case the Defendant asks this Court engage in legislation contrary to the edict of this Court found in *Lesner, supra*. Finally, the Defendant never even attempts to explain how it did not waive any defense not raised as specifically set forth in MCR 2.111(F)(2).

In this case the Plaintiff put the Defendant on notice that she was seeking damages for loss wages and benefits. The Defendant was well aware of the particulars of the case. Defendant was well aware that the Plaintiff was unemployed as a result of its actions. If the Defendant wanted to allege an affirmative defense of mitigation of damages, it was incumbent upon the Defendant, to raise that Defense as it did regarding the Statute of Limitations and failure to state a claim. The Defendant’s failure to do so must be considered a waiver consistent with MCR 2.111(F)(2).

3. THE DEFENDANT’S CONTINUED MISREPRESENTATION THAT THE PLAINTIFF DID NOT LOOK FOR ANY WORK IS NOT SUPPORTED BY THE EVIDENCE OF RECORD. MOREOVER, IN LIGHT OF THE PLAINTIFF’S TESTIMONY THAT SHE LOOKED FOR WORK FOR OVER TWO YEARS BEFORE RESIGNING AN INFERIOR POSITION AT BCNEM WHEN SHE DECIDED TO RETURN TO SCHOOL, MANDATED THAT THE DEFENDANT PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT THE PLAINTIFF COULD HAVE OBTAINED COMPARABLE EMPLOYMENT WITH REASONABLE EFFORT IF THE DEFENDANT WANTED TO PROVE THAT THE PLAINTIFF DID NOT LEGALLY MITIGATE HER DAMAGES.

Plaintiff looked for worked in an exhaustive manner for almost seven (7) months after her employment at BCBSM mysteriously disappeared. In that job search the Plaintiff found out that in the 15 years that she had devoted to BCNEM and its predecessors the market conditions had substantially changed and that all new hires for the position that she had been performing

now required education, degrees, licenses, and substantially different conditions of employment.

In December 1994, one day before her job was filled at BCBSM, BCNEM called the Plaintiff and offered her an inferior position. A position that she fulfilled in an exemplary fashion notwithstanding the fact that received only about 60% of the remuneration that she would have received at BCBCM. During that time Plaintiff continued to look for comparable work. She could not, however, find comparable work. She then decided to file a lawsuit that was filed on or about March 19, 1996, was served in or around June 1996 and was answered by Defendant on or about July 11, 1996. [See docket entries Defendant's Appendix IV].

In another incredible coincidence, shortly after the Defendant is served with the lawsuit, the position of Account Representative is re-posted. [170-171a]. This new posting, however, required a degree. Plaintiff attempted to get a waiver for the degree requirement. [172-173a]. So in over two-years the Plaintiff looked for comparable work and could not find it because of a lack of a degrees and licenses. The Defendant BCBSM, a company that knew her work, knew she had excelled, and had previously offered her a position would not allow her to do the position without a degree. [Id]. Therefore, the Plaintiff did what any reasonable person would do, as the jury found, and quit the inferior position with the intent of going to school to get a comparable degree.

In its Reply brief the Defendant argues that it was not required to offer any evidence in support of its affirmative defense to prove that the Plaintiff could have obtained comparable employment. Defendant cites a panoply of cases that don't apply and that have already been distinguished. [See Defendant's Reply pp. 12-13].

Defendant's own actions show the actual dishonesty that the Defendant is trying to perpetrate on this Court. If the Defendant's claim is true, that it had no duty to set forth any evidence on this point, one would not expect them retain an expert, let alone two.

However, On January 16, 1997, the Defendant retained an expert to testify about comparable jobs, Lawrence Zarkin. [See Witness list attached as 1]. Plaintiff asked in interrogatories, **without waiving objection**, when Zarkin was contacted and what he was going to testify about. Defendant answered that Zarkin **would testify** about the Plaintiff's failure to mitigate her damages and "**THE AVAILABILITY OF COMPARABLE WORK**" [523b] [Emphasis Added]. [This was in January 1997 some six months after submitting its first responsive pleading. Defendant never filed a Motion to requesting leave to file an Amended Affirmative Defense.

It seems odd that the Defendant would hire an expert to testify that the Plaintiff had failed to mitigate her damages, and that there was available work, if they had no such duty. Of course, the Defendant failed to produce anything from Mr. Zarkin because, presumably, he could not identify a single comparable position that the Plaintiff failed to obtain.

Notwithstanding that according to the Defendant it had no duty to prove its affirmative defense, the Defendant then retained another expert, Guy Hostetler. Mr. Hostetler was added just months before trial. Plaintiff received notice of a Fourth Amended Witness List dated November 26, 1997 on December 1, 1997. [Exhibit 2].

Mr. Hostetler's deposition was then taken on March 12, 1998, a matter of weeks prior to trial. Mr. Hostetler could not identify a single comparable job that the Plaintiff could have obtain with reasonable effort. Nevertheless, even though they argue that they had no duty the Defendant informs the Court and the jury that it may call Mr. Hostetler. [97b].

The reality was, of course, that Zatkan and Hostetler could not support Defendant's position. Consequently, Defendant's only prayer was to promote a new theory that is contrary to every case every decided in Michigan and/or the Sixth Circuit. Not surprisingly, Defendant ignores all of those cases.

Defendant contends that Plaintiff's argument, that an adverse inference arises as a result of Defendant failure to call an expert to demonstrate that there were comparable jobs that the Plaintiff could have obtained with reasonable effort, is erroneous. [Reply brief p. 13]. Defendant failed to object to Plaintiff's argument at the time of trial. Defendant's new argument that this was a strategic decision belies its prior conduct. Indeed, Defendant went through two experts in search of someone who could identify even a single comparable job. They could not find one. Therefore, the Defendant was forced to fabricate a new theory.

The Defendant's final argument that the Plaintiff could have called Hostetler, is equally untrue and irrelevant. Hostetler and Zatkan were Defendant's experts. They had work product of the Defendant's counsel. They were not independent medical examiners. Plaintiff could not call these witnesses. Defendant cites no proof that the Plaintiff could have called them. Moreover, the burden of proof on the affirmative defense was on the Defendant, not the Plaintiff. Therefore, there would be no conceivable reason for the Plaintiff to call either witness. Put another way, it would akin to a Defendant calling an economist when the Plaintiff forgets to put in evidence of economic damages.

Finally, Defendant wants this Court to believe that the Michigan jury instructions actually support its position. In a footnote the Defendant urges this Court that the Michigan Standard Jury Instructions do not require it to show that there were substantially equivalent positions

where the “plaintiff fails to make out a prima facie case of mitigation”. [See Defendant’s brief p. 13 fn 7].

This is contrary to the jury instruction, that was not objected to by the Defendant, and every recorded case on point in the State of Michigan and for the Sixth Circuit.

Plaintiff testified as to what she did to look for work, why she accepted inferior employment, and why she ultimately quit that employment to get an education so that she could get comparable employment.

Defendant confuses the respective burdens and duties. Plaintiff has a duty to mitigate. It is, however, the Defendant that must prove that the Plaintiff did not mitigate. Judge Battani read the instruction as follows:

“The **Defendant has the burden of proving that the plaintiff failed to mitigate her damages for loss of compensation.** If you find that Plaintiff is entitled to damages, you must reduce these damages by what the Plaintiff could have reasonably earned with reasonable effort during the period of which you determine she is entitled to damages...**Whether the Plaintiff was reasonable in not seeking or accepting particular employment is a question for you to decide...**

[375b] [emphasis added].

The plaintiff is not required to do futile acts. After looking for almost two years, and having BCBSM confirm that her credentials did not support an account representative position in the free market, Plaintiff made a reasonable decision to go to school. Whether Defendant agrees with the jury instruction it is clear that the issue was a jury question. That is, Jury Instruction clearly states: “**Whether the Plaintiff was reasonable in not seeking or accepting particular employment is a question for you to decide**”.

Plaintiff presented evidence of what she did at varying points in looking for work. Plaintiff accepted inferior employment. Plaintiff then voluntarily left the inferior employment.

Plaintiff testified that she tried to get comparable employment and it was not available. If the Defendant wanted to carry its burden the Defendant had to demonstrate that there were comparable jobs that the Plaintiff could obtain with reasonable effort. The Defendant failed to identify a single job.

RELIEF REQUESTED

WHEREFORE, for all of the aforementioned reasons, Plaintiff-Appellee respectfully requests that the Court deny Defendant's Appeal and Remand this case for the inclusion of appellate attorney fees pursuant to the Elliott-Larsen Civil Rights Act.

Respectfully Submitted,

HURLBURT, TSIROS, ALLWEIL &
PEREZ P. C.

By: 

MANDEL I. ALLWEIL
Attorneys for the Plaintiff
821 S. Michigan Avenue
P.O. Box 3237
Saginaw Michigan 48605
(989) 790-3221

Dated: October 31, 2002

①



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MARCIA SNIECINSKI,

Plaintiff,

vs.

Case No. 96-616254-CZ
Hon. Marianne O. Battani

BLUE CROSS AND BLUE SHIELD
OF MICHIGAN,

Defendant

96-616254 CZ 3/25/96
JDG: MARIANNE O. BATTANI
SNIECINSKI MARCIA
VS
BLUE CROSS BLUE SHIELD OF

MANDEL I. ALLWEIL (P34115)
Attorney for Plaintiff
821 S. Michigan Avenue
P.O. Box 3237
Saginaw, MI 48605
(517) 790-3222

BART M. FEINBAUM (P35494)
Attorney for Defendant
600 Lafayette East, Suite 1922
Detroit, MI 48226
(313) 225-0849

DEFENDANT'S THIRD AMENDED WITNESS LIST

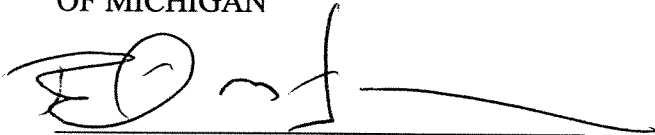
Defendant Blue Cross Blue Shield of Michigan ("defendant"), through its attorney, Bart M. Feinbaum, lists the following as its witnesses in this case:

1. Marcia Sniecinski
2. Donald Roseberry
3. Donald Whitford
4. Michael Curdy
5. Patricia Stone
6. Joel Gibson
7. Charles Boyer
8. Carthel Jones
9. April Williamson
10. Nancy Abramson
11. Sandy Karl

JUN 23 1997

12. Jon Zimmerman
13. Kymberly MacDonald
14. William Toples
15. Kathy Elston
16. MaryAnn DeMarco
17. Alice Cecil
18. Michael Shea
19. Renee Cole
20. Angela Lawrence
21. Molly Wascha
22. Valerie Davidson
23. Gregory Harrant
24. Lawrence S. Zarkin, M.A., CRC, CSW, LPC (expert)
25. All witnesses listed by plaintiff
26. All other witnesses revealed during course of discovery
27. All rebuttal witnesses

BLUE CROSS AND BLUE SHIELD
OF MICHIGAN



BY: BART M. FEINBAUM (P35494)

Assistant General Counsel

600 Lafayette East, Room 1922

Detroit, MI 48226

(313) 225-0849

DATED: _____

6/20/97

2

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

MARCIA SNIECINSKI,

Plaintiff,

vs.

BLUE CROSS AND BLUE SHIELD
OF MICHIGAN,

Defendant

96-616254 CZ 3/25/96
JDG: MARIANNE O. BATTANI
SNIECINSKI MARCIA
VS
BLUE CROSS BLUE SHIELD OF

MANDEL I. ALLWEIL (P34115)
Attorney for Plaintiff
821 S. Michigan Avenue
P.O. Box 3237
Saginaw, MI 48605
(517) 790-3222


BART M. FEINBAUM (P35494)
Attorney for Defendant
600 Lafayette East, Suite 1922
Detroit, MI 48226
(313) 225-0849

DEFENDANT'S FOURTH AMENDED WITNESS LIST

Defendant Blue Cross Blue Shield of Michigan ("defendant"), through its attorney,

Bart M. Feinbaum, lists the following as its witnesses in this case:

1. Marcia Sniecinski
2. Donald Roseberry
3. Donald Whitford
4. Michael Curdy
5. Patricia Stone
6. Joel Gibson
7. Charles Boyer
8. Carthel Jones
9. April Williamson
10. Nancy Abramson
11. Sandy Karl
12. Jon Zimmerman

13. Kymberly MacDonald
14. William Toples
15. Kathy Elston
16. MaryAnn DeMarco
17. Alice Cecil
18. Michael Shea
19. Renee Cole
20. Angela Lawrence
21. Molly Wascha
22. Valerie Davidson
23. Gregory Harrant
24. Arnold C. Dufort 
25. Kevin J. Klobucar
26. Guy Hostetler, M.A., CRC, C.D.M.S, A.B.D.A, L.P.C. (expert - vocational rehabilitation counselor)
27. All witnesses listed by plaintiff
28. All other witnesses revealed during course of discovery
29. All rebuttal witnesses

BLUE CROSS AND BLUE SHIELD
OF MICHIGAN



BY: BART M. FEINBAUM (P35494)
Assistant General Counsel
600 Lafayette East, Room 1922
Detroit, MI 48226
(313) 225-0849

DATED: 11/27/87